

86 NO. 1670

Supreme Court, U.S.
FILED

MAR 9 1987

JOSEPH F. SPANOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

ROBERT G. KILE dba PLAN RIGHT CONST.

PETITIONER,

vs.

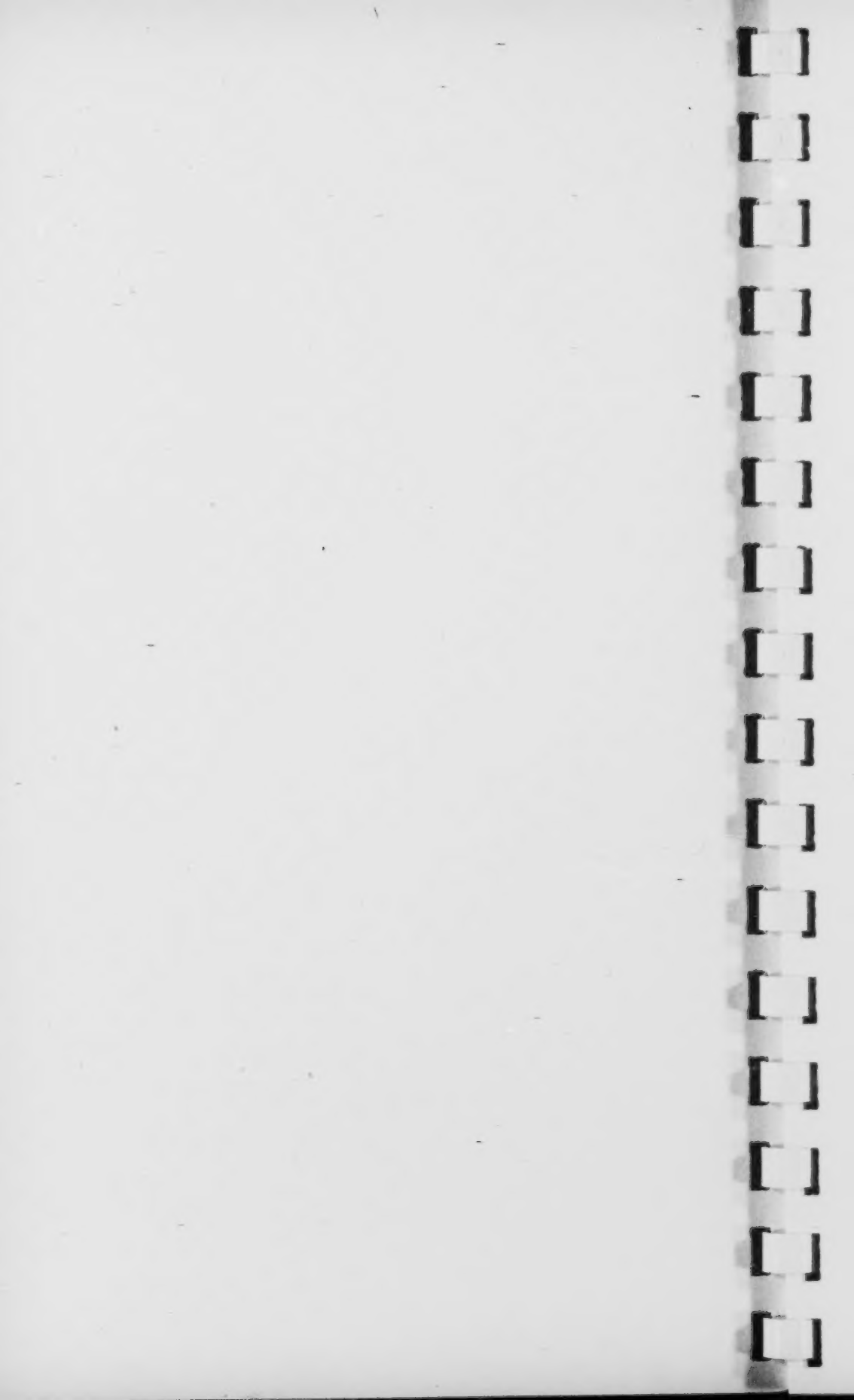
PACIFIC TELEPHONE, et al

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE THIRD COURT OF APPEAL OF CALIFORNIA

BY: ROBERT G. KILE -PRO PER
6313 INDIAN SPRINGS ROAD
LOOMIS, CA 95650
TELEPHONE: (916) 652-7870

45 PD



QUESTIONS PRESENTED

Did the OPINION below deny me due process and equal administration of law in the context of my case resulting in injury and injustice, and did the reviewing court erroneously deny review-rehearing when:

1. The judgement roll contains SUBSTANTIAL evidence of departure from usual procedure to disclose relationships in the form of respondent admissions-see APPENDIX 10, 21 and evidence code re: exception to hearsay rule, etc., 21 Cal D 2d 530-#265

2. Case law-being used does not truthfully nor accurately reflect the context of the merit under JUDGEMENT ROLL review.

(a) Were the Justices discriminate in review because of existing "ADMISSIONS"? see APPENDIX 21-27 and 11-21 ALL INTENDMENTS WERE ON NON-DISCLOSURE

(b) Is surprise evident in review by orally raising sworn pleadings issue in the first instance in review hearing when the lower Court AND respondent passed on the alledged defect of sworn pleadings by



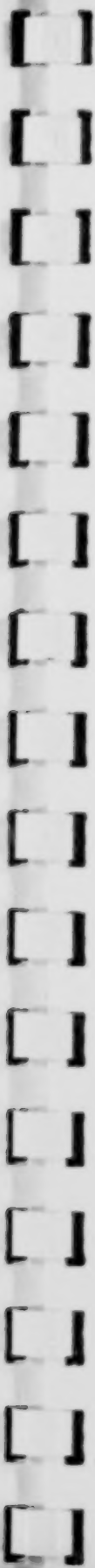
arguement of the contentions/allogations
in my MOTION TO VACATE? see APPENDIX 27

3. A factual presentation exists in
using California Codes.

(a) ie-I say you done or not done or
should do,etc., and you admit;only applicable
law remains, RE: respondent responded to
my unsworn PROOF OF SERVICE without any
issue- see appendix 27. Do I have to prove
I mailed pleadings in the context of the
response? Do I have to prove my contentions/
allegations in the context of the admissions
made under penalty of perjury? see APPENDIX
21-23,24,25,26

4. Sworn pleadings were never an issue
in the lower Court arguement."fair and
impartial adversary hearing"? - No transcript
and no settled statement allowed. (DUE
PROCESS??)

5. Did Judge Warren vitiate the alledged
intendments[the OPINION] see APPENDIX 9
in my motion to vacate before Judge Backus
by not ruling on "sworn pleadings"? see
APPENDIX 21 #4 It is possible in the



context of the admissions and my "CERTIFYING" my pleadings to be true, that the sworn pleadings issue is repugnant to the merits in the judgementroll merits under review.

6. Was respondents exhibit "B" letter-APPENDIX 23-25 , addressed to the A.A.A. sufficient to invoke Commonwealth supra and Johnston supra? My contentions/allegations AND respondent response were considered yet they were not sworn and the result of the consideration given was not on the issue at hand.

(a) Was the A.A.A. erroneous to allow the arbitrator to continue in light of the respondent admissions?

(b) Were my rights prejudiced to make another selection as to the rules and law?-appendix 11-17

(c) In the context of the admissions and the case, has there been a "trusting atmosphere"? appendix 15

(d) Did Judge Evans interrupt and silence the respondent because of his direction of his testimony in the oral



argument on 11-25-86 regarding "ADMISSIONS", WERE CONSIDERED", ETC..?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i-iv
TABLE OF AUTHORITIES	v-vi
JURISDICTION	v,vi,2
STATUTES INVOLVED	vi,2
DISTINCT STATEMENT OF FACTS AND ERRORS	2
REASONS FOR GRANTING THE WRIT	v,vi,6,7,9
APPENDIX TABLE OF CONTENTS (APP. 1-27)	vii



TABLE OF AUTHORITIES
CERTIORARI/ JURISDICTION:

Arrosmith V. Harmoning 118 US 194 6S.CT.
1023. 30 Led 243 (due process)

Baldwin Const. V. Essex County BD of
Taxation 108 A 2d 598,606 16 NJ 329
(error on face of record)

Commonwealth Coatings v. Continental Casulty
Co.393 US 145, 89 S.CT.377, 21 Led 301.P148-
151 (trusting atmosphere)

Drumheller v. Berks County Local BD No. 1
130 F2d 610 (judicial act/function)

Johnston v. Security Ins. Co. 6CA 3d 839
86 CalRptr.133(admissions/invoke commonwealth)

McCain v.Collins 164 SW 2d 448,451 204
ARK 521 (legal sufficiency of evidence)

Sully v. American Nat'l Bank 178 US 289
20 S. CT. 935 (error)

Worcester GAS Light Co. v. Commission of
Woodland Water Dist. in Town of Auburn 49
NE ed 447,448 314 Mass 60 (errors/injury)

ADMISSIONS:

Camacho v. Escobedo, 313 P2d 28, 152 CA 2d
198 ("Declarations contrary to position are
admissable and constitute positive proof")

Crawford v. Alioto 233 P2d 148, 105 CA 2d
45 ("Litigant's declaration contrary to his
position is admissable evidence under the
hearsay rule as admission constituting
positive evidence tending to prove truth of
matter admitted")



Du Frene v. Kaiser Steel 41 Cal Rptr. 834, 231 CA 2d 452 (affirmative/evidence on either side)

Fambrini v. Strikers 6 Cal Rptr. 833, 183 CA 2d 235 ("An admission is an exception to the hearsay rule and carries evidentiary support")

Feierbach v. Wynn 18 Cal Rptr. 697, 199 CA 2d 454 ("The admission of a fact by a party, of itself, is sufficient to prove truth of matter")

Johnson v. Security Ins. Co. 6 CA 3d 839 86 Cal Rptr. 133 ("Here the operative facts for invoking the rule of the Commonwealth Coatings case are admitted by the pleadings and declarations")

People v. One Mercury Sedan..254 P2d 666, 116 CA 2d 746 ("Declaration contrary to position is evidence tending to prove matter admitted")

State Farm Mutual Ins. v. Porter 186 F2d 834, ("Admission is equivocal to affirmative testimony for the party offered") CCP 1832, 1850, 1870#5

EVIDENCE CODE-UNSWORN PLEADINGS, "except for stipulations or admissions contained therein the unsworn pleadings of counsel do not constitute evidence")

STATUTES:

California Code of Civil Procedures NOS.452, 632, 1832, 1850, 1870#5, 1291, 1286.2, 1981

C.J.S.-CORPUS JURIS SECUNDUM: Certiorari, evidence, pleadings, etc.

5 American Jurisprudence 2d No. 181

I, Robert G. Kile,

hereby PETITION FOR WRIT OF CERTIORARI
whereby I ask this Honorable Court of this
United States to review the California State
Supreme Court and Third Court of Appeal that
denied my meritorious PETITIONS FOR REVIEW
(App. 1,2) of the Third Court of Appeals
Opinion (App. 3-10) Case No. 3 Civil 26182.

I alledge there IS substantial admissable
evidence in the JUDGEMENT ROLL. I alledge
there is substantial injustice, error, abuse
of discession, violation of my rights, discrim-
ination because of special interests and
neglect to apply fairly and without prejudice
to respondent, the appropriate law and statute
because of the arbitrators failure to disclose
the full round of admitted relationships in
the arbitration under review. I believe
substantial mistake and fraud is involved, I
accompany this PETITION with an APPENDIX of
the record (FACTS,EVIDENCE,LAW,APPLICATIONS)



JURISDICTION

The character of reasons is invoked under 28 USC #1254-See AUTHORITIES pages v,vi.

STATUTES INVOLVED

This case involves the application of the evidence codes and related statutes because my pleadings were alledged unsworn;CCP 632.

DISTINCT STATEMENT OF FACTS AND ERRORS

1. The Sacramento, CA Superior Court erroneously denied my meritorious MOTION TO VACATE ARBITRATION AWARD ON April 2,1986-RECORD AT 215;the arbitrator failed to disclose a "full round of relationships" with the party and its counsel.(App.20-27) Had I any prior knowledge, I would have exercised my right to disqualify him as to the rules and made another selection (App.20). The respondent substantially "admitted" the allegations in my MOTION (App.27),therefore,only question of law remained-CCP 1286.2 (see App.20-27, Commonwealth & Johnston supra App.13-17, and CCP 452,632,1291-"FINDINGS AND CONCLUSIONS,



ADMISSIONS, LIBERAL CONST. OF PLEADINGS-

(APP.18-19)

I was further denied a Settled Statement because there was no Court Reporter in the lower Court oral hearing. All intendments were addressed to the issue of non-disclosure; the Judge (Backus) got extremely biased because of my aspect of a social relationship not disclosed by the arbitrator (App.6, 11,12,24,26) (App. 20 #146**) RECORD AT 225, 238.

2. I filed appeal with the Third Appellate Dist. in Sacramento, CA on April 14, 1986, RECORD AT 219. At all times respondent passed and gave full validity to this appeal (app.7) A hearing was held and an OPINION was filed on December 9, 1986 (APP.3-10) In the hearing the presiding justice promised careful review of the judgement roll -CCP 670-(ORIGINAL SUPERIOR COURT FILE, O.S.F.) because of allegations that my pleadings were not "sworn", that there existed no evidence, etc. This issue was NOT raised in the oral hearing before the lower court, and if it had, I would

have orally sworn them at that time. This was surprise. The respondent and the judge substantially passed on any alledged defect by giving full validity and discussion of the allegations in my MOTION. In following the reviewing Courts OPINION, NO arguement or discussion ON disclosure should have been addressed; only issue of sworn pleadings. see fraudulent concealment/mistake/variance.

ENCLOSED IS A CASSETE TAPE
-hearing of 11-25-86-

3. I filed request FOR RECONSIDERATION in the reviewing court, stating the respondent "admitted" the allegations and a finding of fact was not required in the context of the case. The request was termed a PETITION FOR REHEARING (App.2) and was denied. I alledged a rehearing was not essential and the indiscriminate use of the judgement roll would supply admitted facts as evidence. "The record before this court DOES ~~not~~ contain evidence" (App.10) Furthermore, as to the context of the admissions (App.21-27) it may very well be determined my pleadings were



sworn (App.27) regarding facts of my case and waiver by admitted answer-"I certify" said document is true" (JUDICIAL NOTICE)

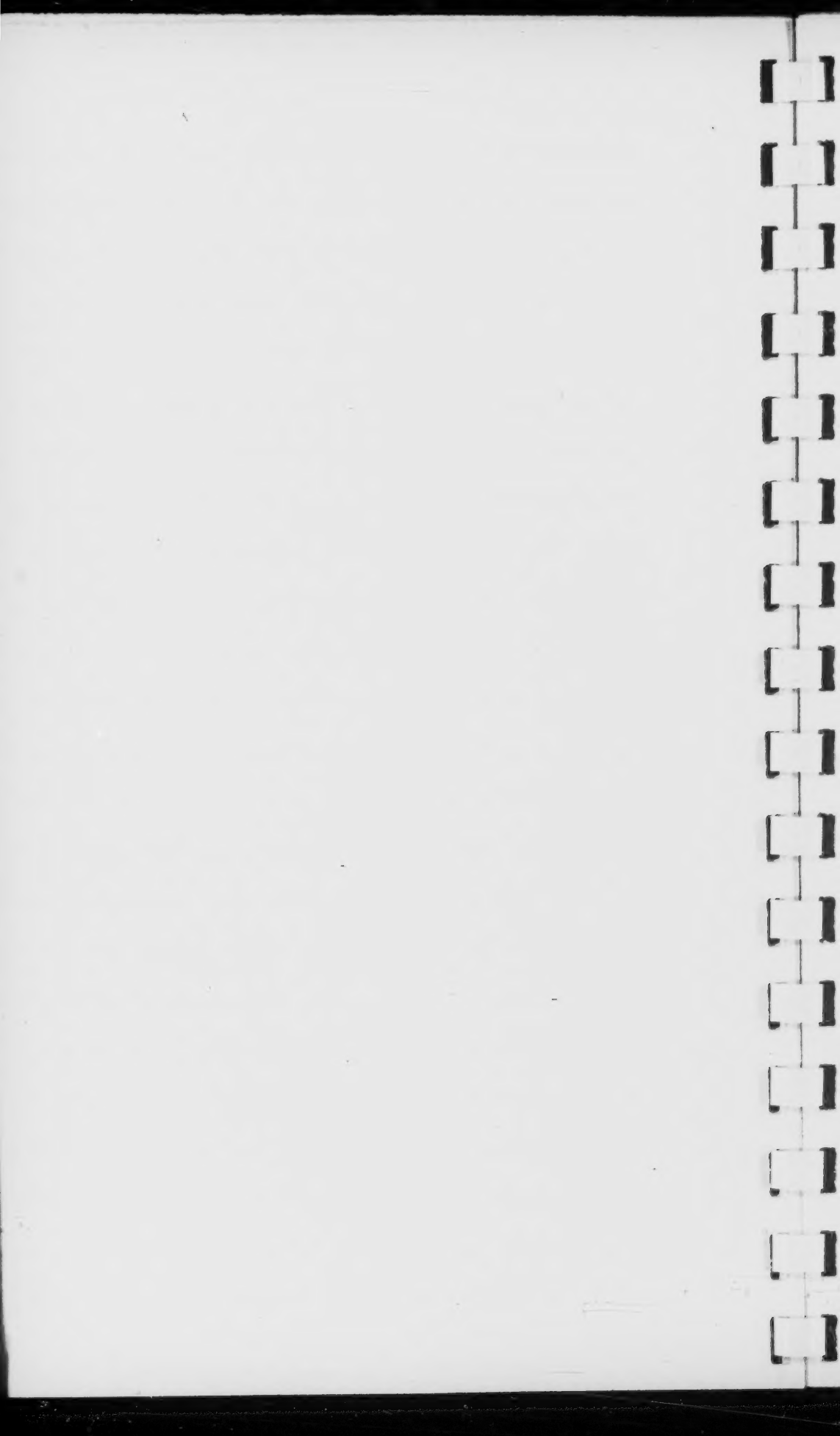
4. I then timely submitted PETITION FOR REVIEW to the California State Supreme CT. on January 13,1987. I also timely submitted an ANNEX as an APPENDIX which was filed on January 16,1987. The purpose of the ANNEX/ APPENDIX was to distinctly point to the Court my allegations WERE ADMITTED and that there exists a FACTUAL PRESENTATION! - (App.21-27, 11,12,13,14) see AUTHORITIES

5. On February 25,1987, the Supreme CT erroneously denied my meritorious PETITION FOR REVIEW (App.1) I believe that because the respondent substantially passed on the alledged defect regarding sworn pleadings which is contrary to their position, in their waiver by arguement ,answer, and ADMISSIONS; that findings of fact were NOT REQUIRED in following applicable law and statutes AND case law , that the lower CT. DID erroneously deny my MOTION TO VACATE AND BRIEF. The issue of sworn pleadings was no more than a contrived

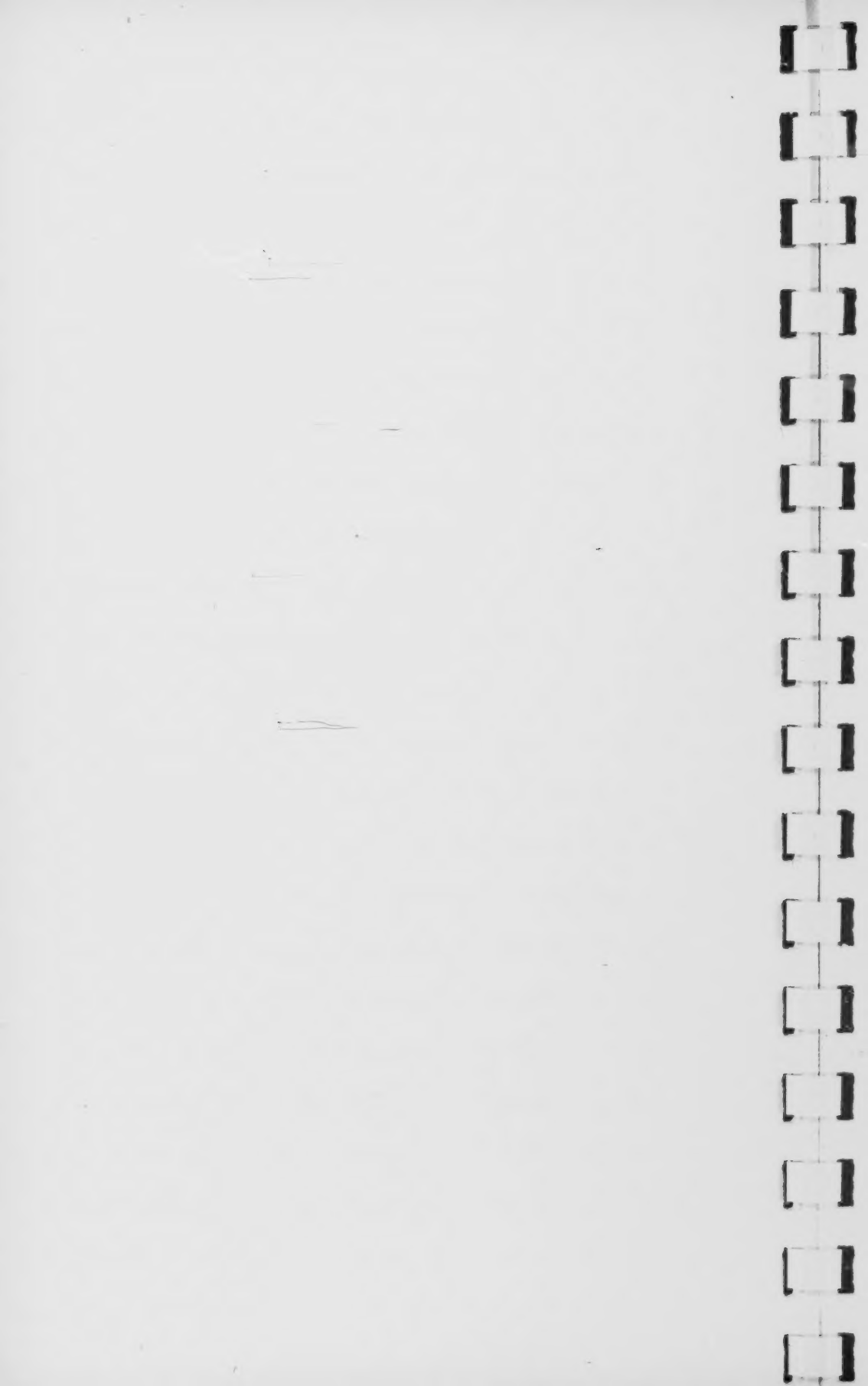


excuse by design and intent and a convenient excuse to favor others because of the influences involved, "MOVERS AND SHAKERS". Clearly, the lower CT. could NOT have ruled as the reviewing CT. OPINION set forth because there IS substantial admissable evidence apparent on the face of the judgement roll ON NON-DISCLOSURE; only conclusion of law remains- CCP 1286.2-VACATE THE AWARD!! (App.16-19). I do not profess sophistication in the law to misrepresent the case as the California Courts, with my adversary, have effectively done. J U S T I C E in this instance clearly means: JUST-US!

There is substantial injustice because of the party, the arbitrator and the counsel involved and their influences in this local set up of influences. I am being discriminated against by the discriminate use of the judgement roll in review, by the Courts. They are suppressing the evidence which is extension of coming into arbitration, violations of disclosure and denial of a fair and impartial adversary hearing. "A trusting atmosphere"?

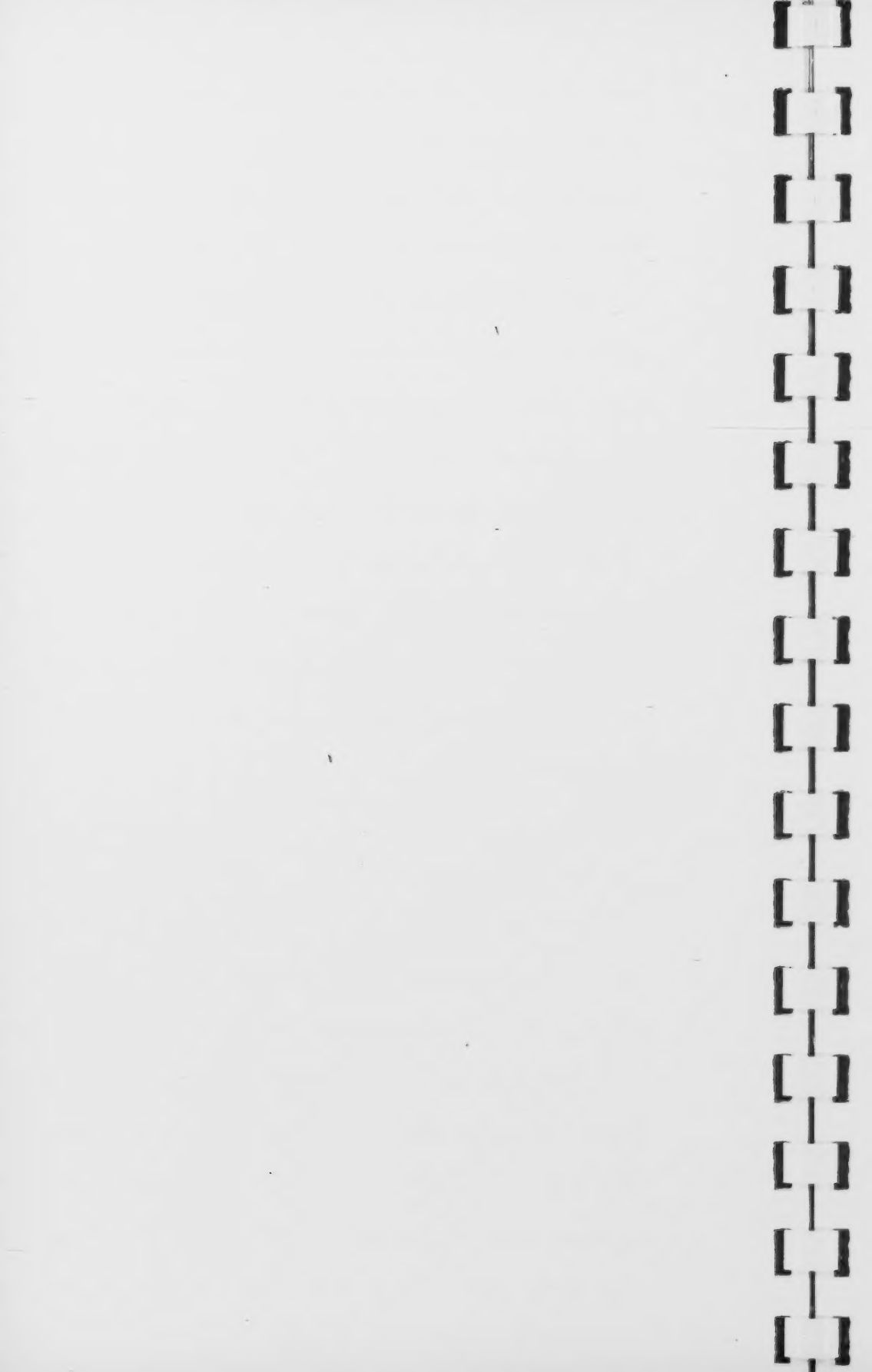


There is substantial merit in my MOTION TO VACATE AND BRIEF. There is substantial evidence in the form of admissions!, which the Courts are suppressing. There is injury to my rights, there is favortism and biased judgement and deprivation of personal property by allowing an arbitrator to violate covenants of disclosure whom I do not trust to fairly compensate me in my arbitration grievance. Clearly, he DID NOT follow the law and rules of disclosure in the "ADMISSIONS" and I was unjustly deprived of my right to another choice for arbitrator (App.20) by his personal interests in the outcome and the relationships involved. I DO NOT have "complete confidence" in this arbitrator's impartiality because of his concealments of the admitted relationships -record at 145, 146, 151- 157, 169-172, 75-78, "admissions" 207-210. Careful review by WRIT will get rid of the void judgement appearing on the face of the record because there IS admissable evidence in the judgement roll. Careful review by WRIT will correct the errors, fraud,



and mistake to prevent the injustice to live to eternity. State statutes not limited to CCP 1291/632/452 provide the due process of law and they are being negated and ignored because of the extension of the influences involved. There would not be one scantilla of prejudice (App. 25,26) to respondent regarding "LIBERAL CONSTRUCTION" of my pleadings; because of their admissions to my allegations and CLEARLY, they were not tricked as I have been. Just look at the scales of "JUST ICE" from the facts and errors involved and note the weight of prejudice to me.

In reading the OPINION , RE: Hirsch supra (App.8) and (App.21-27); if the "intendments" (App.9) suppose to apply in this instance, then clearly there is fraud involved because: The respondent "admitted" allegations and the judge abused his discretion by not applying CCP 632 (App.17,18,19) being essentially an agreed statement of facts (App.25,26) carrying into several other admissions starting



at RECORD 151-(App.21). THERE IS EVIDENCE BEFORE THE COURT IN THE JUDGEMENT ROLL AND IT IS BEING CONCEALED AND SUPPRESSED BECAUSE OF INFLUENCES. The said Courts are bringing the judicial office into disrepute and the record must be reviewed de novo for vacating the award so I may have a fair and impartial AND "trusting atmosphere". There is no way the judges could have missed the admissions (App.21-27)

WHEREBY,

I pray this Honorable Court discern the outrage of the violations of covenants of trust which should be present in ANY judicial proceeding; being the spirit of any foray into the AMERICAN adversary system. I will forever persevere in my contentions by wanting part in this system to which I have been prevented participation in. My rights to this system have been violated completely. I would not waste precious judicial economy and my valuable time and being away from my family in this endeavor if I didn't want to do my part to uphold the principles believed important in the vigilance

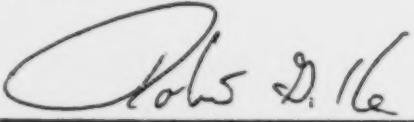


to maintain OUR constitutional rights.

THANK YOU.

I CERTIFY THIS PETITION, INCLUDING APPENDIX
TO BE TRUE.

DATED THIS APRIL 14, 1987


ROBERT G. KILE

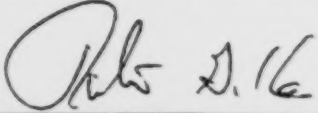
FOOTNOTE: The American Arbitration Assn. has
never participated in the court proceedings,
however, they should be an interested party.

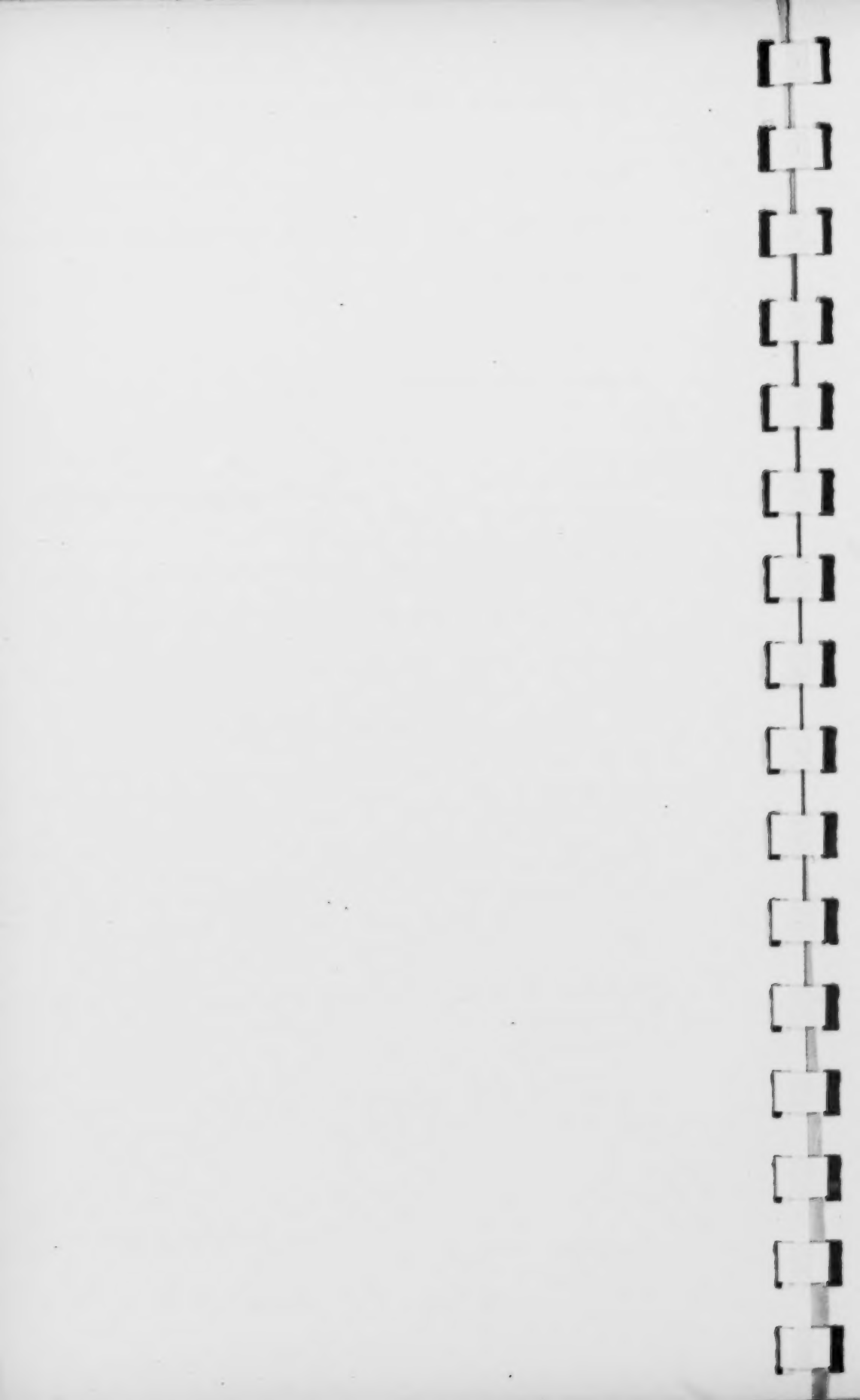
PROOF OF SERVICE

I am over the age 18, I reside in Placer County
CA, and I am a citizen of this United States.
On April 14, 1987 I served three (3) true
and accurate copies of my PETITION FOR WRIT OF
CERTIORARI on the following opposing counsel
by placing said copies enclosed in a sealed
envelope in the U.S. Mail AT Rocklin, CA 95677
addressed as follows:

DOWNEY, BRAND, SEYMOUR & ROHWER-ATTY FOR PACIFIC
555 Capitol Mall Suite 1000
Sacramento, CA 95814

I Certify the following to be true and accurate
under penalty of perjury this April 14, 1987.

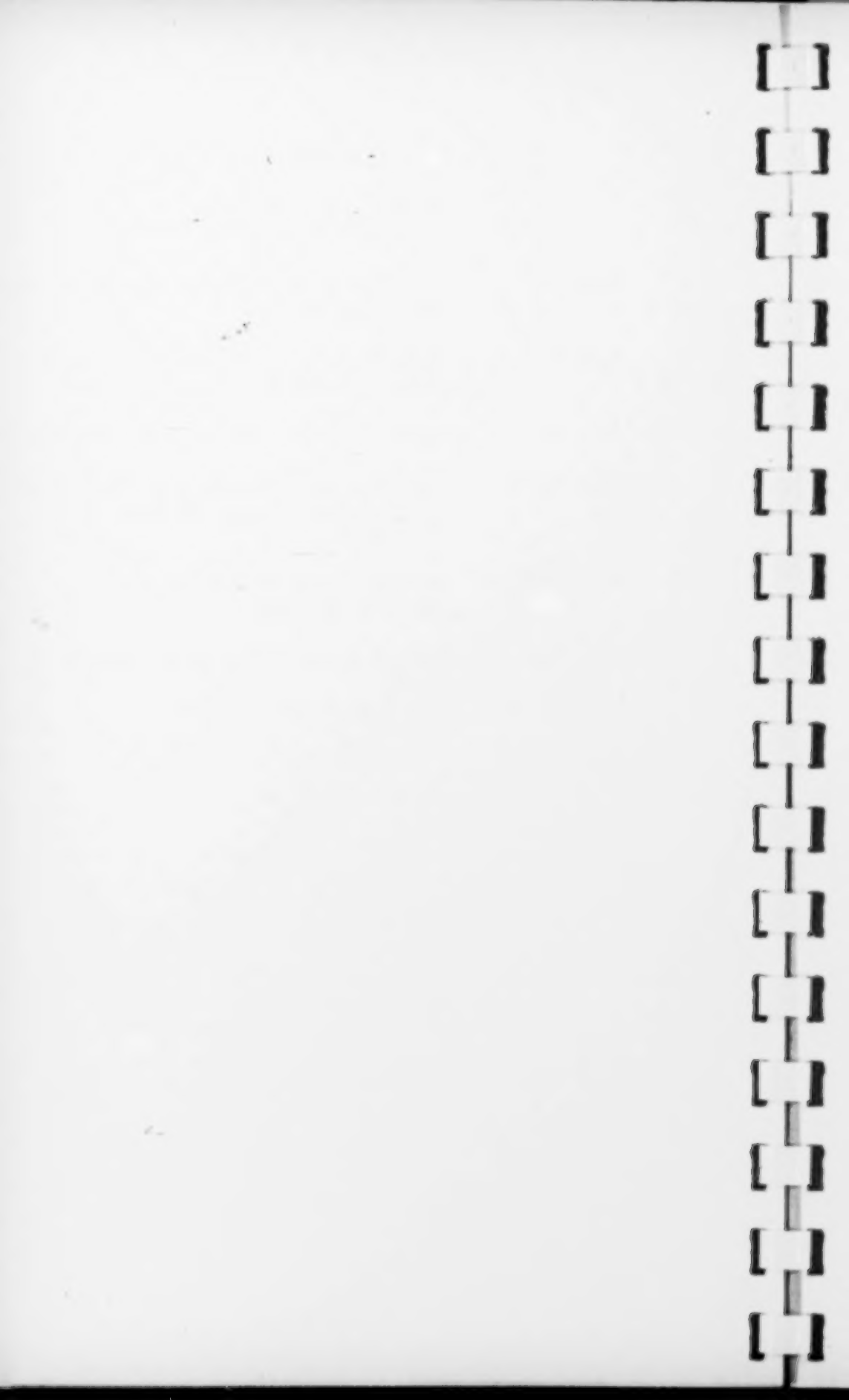

ROBERT G. KILE



APPENDIX

TABLE OF CONTENT (APP 1-27)

App 1.	California Supreme Court Order Denying Review
App 2	Third Court of Appeal Order Denying Re-hearing Review
App 3-10	Third Court of Appeal Opinion
App 11-12	"A Proper Errata For Pacific Bell Respondents Reply Brief "Should Read"
App 13-17	Quotations From Johnston v Security Ins. Co. Supra
App 18-19	California Code (Annotated)
App 20-21	Record at 145, 146
App 21-27	"Admissions"



(App.1)

ORDER DENYING REVIEW

AFTER JUDGEMENT BY THE COURT OF APPEAL
3rd DISTRICT, CIVIL No. 26182

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

KILE, etc., Appellant,

v.

PACIFIC TELEPHONE AND TELEGRAPH et al.,
Respondents.

Appellant's petition for review DENIED.

SUPREME COURT
FILED
FEB 25, 1987
Clarence P. Gill, Clerk

DEPUTY

LUCAS
Chief Justice



(App.2)

IN THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA

IN AND FOR THE
THIRD APPELLATE DISTRICT

Robert G. Kile,dba
PLAN RIGHT CONSTRUCTION,
Plaintiff and Appellant
3 CIVIL 26182
vs. Sacramento 326642

PACIFIC TELEPHONE AND TELEGRAPH and
THE AMERICAN ARBITRATION ASSOCIATION,
et al.,
Defendants and Respondents.

By the Court:

Appellant's "affadavit of merit,
petition, memorandum, motion for reconsid-
eration" and "addendum" are treated as a
petition for rehearing with addendum and
as such are denied.

Dated: January 5, 1987

EVANS, acting P.J.

FILED-JAN 5, 1987
Court of appeal-Third District
WILLFRED J. KRAMER, Clerk
BY _____, Deputy

(App.3)

FILED

DEC 9, 1986
Court of Appeal-Third District
WILLFRED J. KRAMER, Clerk
BY _____, Deputy

not to be published

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

ROBERT G. KILE, dba
PLAN RIGHT CONSTRUCTION, 3 CIVIL 26182
(Super.CT # 326642
PLAINTIFF and RESPONDENT

V.

PACIFIC TELEPHONE AND
TELEGRAPH, and THE AMERICAN
ARBITRATION ASSOCIATION, ET AL

DEFENDANT and RESPONDENT.

Plaintiff, Robert G. Kile (KILE)
appeals on the judgement roll from an order
denying his motion to vacate an arbitration
award. Kile contends his right to arbit-
ration by a neutral arbitrator was subst-
antially prejudiced by the arbitrator's

7

(App 4)

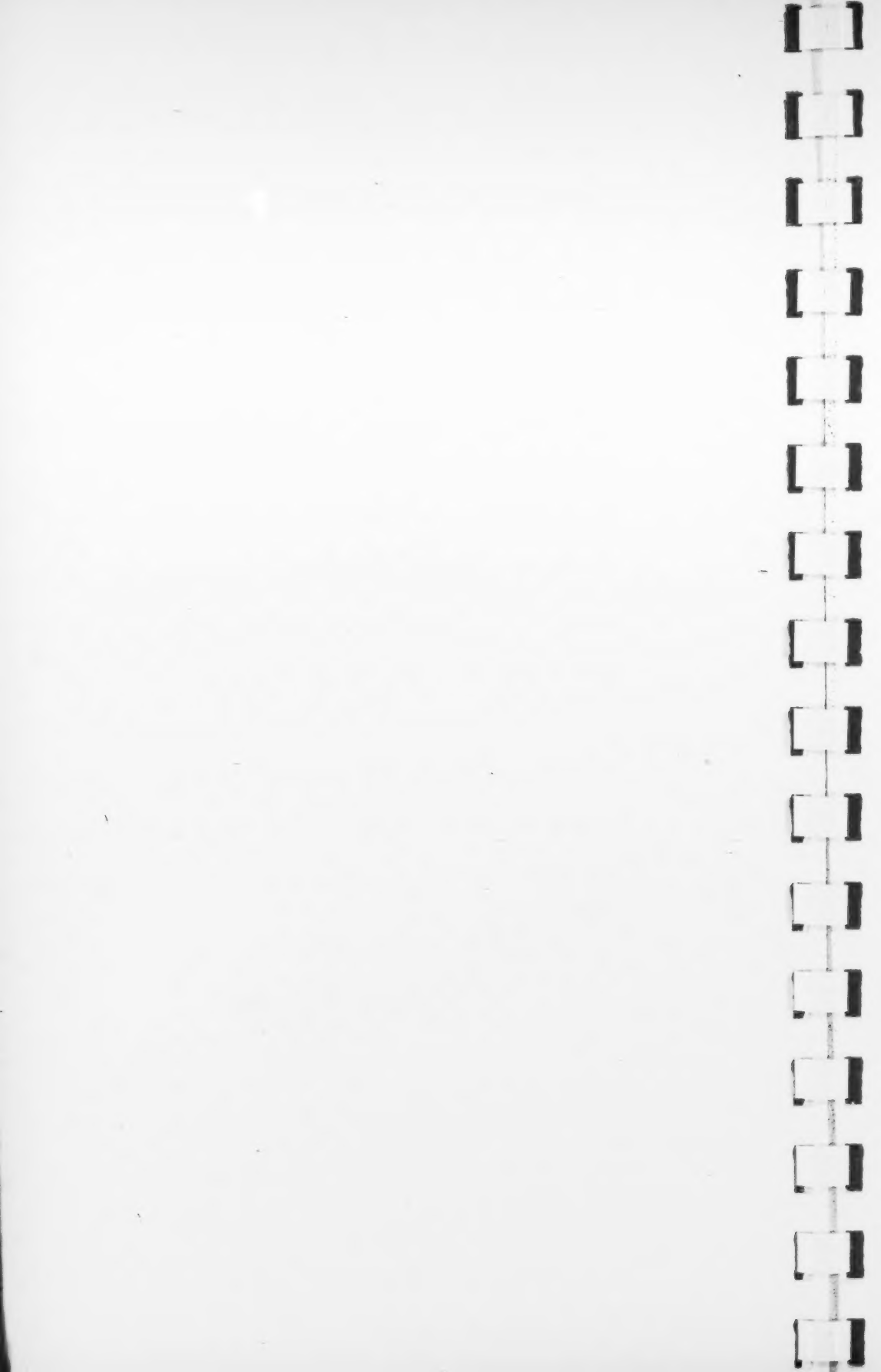
failure to disclose to him certain business and personal relationships with the defendant, the defendant's employees, and defendant's counsel. WE shall affirm.1

1 Kile moves to strike the respondents brief on the ground that it is in excess of the 10 page limit under the expedited appeal program. The rules under that program limit the size of the briefs to 10 pages, exclusive of statement of facts. Respondent's brief contains 8½ pages of facts, and 10 pages of argument, and is therefore within the limits of the rule. Kiles motion is denied.

-1-

FACTS

The proceedings in this case arise out of a contract dispute between Kile, dba Plan Right Construction Company (Plan Right) and defendant Pacific Telephone and Tele-



graph Company (Pacific Telephone). In October 1981 the parties entered into a written contract whereby Plan Right agreed to construct a building for Pacific Telephone in Wheatland, California. The contract provided for the arbitration of "all claims, disputes and other matters in question between Contractor, any subcontractor, and Telephone Company or any two of them, arising out of, or relating to, the contract document or the breach thereof....."

A dispute arose between the parties concerning the retention fee and various sums relating to change orders and extra work. In January 1985 Kile petitioned the Court for an order compelling Pacific Telephone to arbitrate the controversy.

The petition was granted. The parties then proceeded to arbitrate the matter before an American Arbitration Association arbitrator mutually selected from a list of *proposed arbitrators.

On December 10, 1985, the arbitrator



(App. 6)

awarded Kile \$4,250.00. Kile then moved the court to vacate the award on the ground that he was substantially prejudiced by the failure of the arbitrator to disclose certain business and personal relationships with Pacific Telephone, its employees and

-2-

counsel. A hearing was held on the motion on March 27, 1986. The motion was denied. This appeal follows.²

DISCUSSION

Kile contends that his right to arbitration by a neutral arbitrator was substantially prejudiced by the arbitrator's failure to disclose certain business and personal relationships with Pacific Telephone, its employees, and counsel.

The burden of proof was upon Kile to show the existence of significant or substantial business relationships which should have been disclosed to him to avoid the appearance of impropriety. (United Brotherhood of Carpenters etc., Local 642 V.



(App. 7)

Demello (1972) 22 CAL. App. 3d 838,840.)

2 Although the Respondents have not raised the point, the order in this case is not an appealable one. With respect to arbitrat- proceedings, code of civil procedure sect. 1294 provides that "an aggrieved party may appeal from: (a) An order dismissing or denying a petition to compel arbitration. (b) An order dismissing a petition to confirm, correct or vacate an award. (c) An order vacating an award unless a rehearing in arbitration is ordered. (d) A judgement entered pursuant to this title. (e) A special order after final judgement". Pursuant to this section an order denying a petition to vacate an arbitration award is not an appealable order (Jordan v. Pacific Auto Ins. Co. (1965) 322 Cal App 2d 127,129) and neither is an order confirming an award (Hohn v. Hohn (1964) 229 CAL App 2d 336, 338); only the judgement entered thereon is appealable. (Ibid.) No judgement has been



(App. 8)

entered in this case.

In the interests of justice and to prevent unnecessary delay, we will deem the order denying the motion to vacate the award to include a judgement in favor of Kile in accordance with the terms of the arbitration award and will interpret the notice of appeal as applying to that judgement. (See 9 Witkin, Cal Procedure (3d ed 1985) No. 59 pp 82-84.)

-3-

Kile's motion to vacate the award is not supported by any affidavits or sworn declarations. (See Hirsch v. Ensign (1981) 122 Cal App 3d 521, 529.) The specific "FACTS" upon which Kile relies as the basis for his motion are supplied by his unilateral allegation of facts in papers accompanying the motion. However, matters contained in unsworn pleadings are not evidence. (Estate of Nicholas (1986) 177 Cal App 3d 1071, 1090, 1091.)

Furthermore, it is incumbent upon Kile



(App. 9)

to affirmatively show that error was committed by the court below. (Utz V. Aureguy (1952) 109 Cal App 2d 803,806.) This court has before it only the original Superior Court file. There is no transcript of the proceedings on the motion to vacate the award.

"'When an appeal... is to be determined upon the judgement roll alone, all intendments will be made in support of the judgement, and all proceedings necessary to its validity will be presumed to have been regularly taken.... if any matters could have been presented to the court below which would have authorized the entry of this judgement, it will be presumed on this appeal, in support of the judgement, that such matters were so presented, and that the judgement was entered in accordance therewith.' [citations.]" (Utz v. Aureguy, supra, 109 Cal App 2d at p 806.) When no record of the evidence before the trial court is made or supplied this court, it must



(App. 10)

-4-

be presumed the evidence supports the order. (Ibid.) The record before this Court contains no evidence.

The judgement is affirmed.

SIMS, J

We concur:

EVANS, Acting P.J.

SPARKS, J.

-5-

(App 11)

CASE NO. 3 CIVIL 261 82

A PROPER ERRATA FOR PACIFIC BELL

RESPONDENTS REPLY BRIEF "should read":

First take the "not" out of their arguement in No. IV including "may have" and insert the "not" in no.II after the work was.

Second, take the "no" out of No. I and the "not" out of no.III along with the word "RESPONDENT'S";

THEREFORE each No. should read:

NO. I:There IS competent evidence before this court which enable it to pass upon the validity of the claims being asserted by appellant.

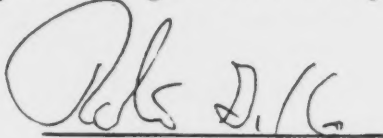
NO.II:There WAS NOT disclosure by the arbitrator to the extent mandated by the circumstances and in keeping with applicable law;CCCP 1286.2 annotated "PREJUDICED RIGHTS"

NO.III:There ARE sufficient grounds based upon appellants contentions of[an impression of bias] on part of the arbitrator to vacate the arbitration award. ADD[failure

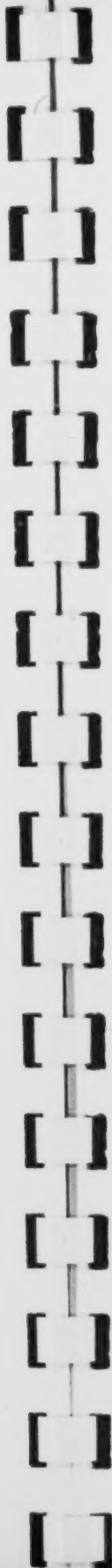
(App 12)

to disclose]

NO. IV: The arbitrator DID have a duty to disclose his previous relationship with a company which HAD dealings with respondent.


ROBERT G. KILE

RECEIVED
OCT 29, 1986
Clerk court of appeal
Third Appellate District



(App. 13)

QUOTATIONS taken from the text of

Johnston V. Security Ins. Co.

6 CA 3d 839-845; 86 Cal Rptr.133;

which are relative to the context of my case; which was used in my briefs:

Page 839: "The Court of appeal affirmed the order of the trial court, holding that the umpire was under a legal duty to disclose to the parties any dealings that might create an impression of possible bias at the outset of the hearing. The court further held that express findings of fact and conclusions of law were not required as a matter of law in the context of the case".

(1)ARBITRATIONno. 45-AWARD-VACATION BY COURT-EVIDENCE- "The trial court correctly vacated an arbitration award against an insurance company, where the undisputed facts showed that the neutral umpire chosen by the appraisers selected by the parties failed to disclose his...

Page 840:...acquaintanship with the claimants' counsel and claimants' appraiser and



(App.14)

his past and prospective business dealings with the appraiser; the fact that no actual fraud or bias was charged or proved against the umpire was immaterial".

'[see Cal Jur 2d, REV., Arbitration and award, #58; Am Jur 2d, Arbitration and award, #181.]'

(2) ARBITRATION NO. 43-AWARD-VACATION-FINDINGS- "An order of the trial court vacating an arbitration award against an insurance company was not vitiated by the court's failure to make express findings of fact and conclusions of law, where the operative facts requiring vacation of the award were admitted by the pleadings and the declarations" Page 841:(1) "Should the rule enunciated in COMMONWEALTH COATINGS CORP. v. CONTINENTAL CAS. CO. (1968) 393 U.S. 1112 [21 Led 2d 301, 89 S.CT. 848] , be adopted as a legal cause for vacating an arbitration award?"

(2) "Did the Superior Court's failure to make express findings of fact and conclusions of law in the context of this



(App. 15)

case render the order appealed from invalid?"

"We answer the first question , "YES" and the second question , "no" for the reasons set forth below".

"The court shall vacate the award if the court determines that: (a) The award was procured by corruption, fraud or other undue means; (b) There was corruption in any of the arbitrators;..." CODE OF CIVIL PROCEDURE NO, 1286.2 "

Page 842: "Justice Black stated: We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias"

"Justice White stated: The arbitration process functions best when an amicable and trusting atmosphere is preserved....., But if the law requires the disclosure, no such imputation can arise. And it is far



(App. 16)

better that the relationship be disclosed at the outset, when the parties are free to reject or accept him..."

Page 843: "Thus the undisputed facts bring this facet of the arbitration proceeding under review within the zone where the rule of commonwealth coatings is applicable"

.."the neutral umpire or arbitrator, should have disclosed his acquaintanceship with claimants' counsel and Burgard and his past and prospective dealings with Burgard".

Page 844: "The Superior Court , therefore, was correct in ordering the award vacated"

"While specific findings recapitulating the uncontroverted facts and a specific conclusion of law might have promoted clarification and expediency, such findings and conclusion were not required as a matter of law in the context of the case...If facts alledged in the complint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existance...further-



(App. 17)

more, no finding is necessary as to any allegation admitted by the pleadings and a finding contrary thereto cannot stand".

Page 845:"While the two cases cited..

pertain to CCP 632, the rationale is equally applicable to findings pertaining to arbitration awards, Here the operative facts for invoking the rule of the Commonwealth Coatings case are admitted by the pleadings and declarations. The omission of the Superior Court to make express findings and conclusions in this context did not vitiate the minute order in question".



(App. 18)

California Code of Civil procedure:

1286.2 (annotated #15) : "For claimed departure from usual procedure to amount to misconduct of arbitrator sufficient to vacate the award, it must be shown that it prejudiced rights of one of parties".

452: "Pleadings to be liberally construed. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties".

632-TRIAL BY COURT (annotated 216) : "No finding is required of an admitted fact.... findings need not include facts admitted by pleadings". (annotated 217) : "Findings of fact are unnecessary where case is submitted on agreed statement of facts". (annotated 271) "Rules that if facts alleged in complaint are not controverted by answer, they are not in issue, and that no finding is necessary as to any allegation admitted by pleadings and finding contrary thereto

(App. 19)

cannot stand are applicable to findings in connection with judicial proceedings pertaining to arbitration awards".

1291: JUDICIAL PROCEEDINGS (annotated 3);

"If petition or motion made to court presents no issue of fact and only one of law, no specific findings and conclusions by court are necessary." (annotated 4):

"Where Superior Court vacated arbitration award in favor of insured in controversy with insurer over proceeds of fire policy on ground that neutral umpire did not disclose his acquaintanship and business dealings with insured's appraiser, findings and conclusions of Superior Court were not required". Johnston V. Security Ins. Co.
supra

BEST AVAILABLE



COPY

(App. 20)

ORIGINAL SUPERIOR COURT FILE RECORD
OF EXHIBITS "FILED" in an appendix
before the SUPREME COURT OF CALIFORNIA
on January 16, 1987:

RECORD AT 145: American Arbitration Assn.

CONSTRUCTION ARBITRATOR LIST-case No.
74-110-0393-82

LIST SUBMITTED TO THE PARTIES; on behalf
of Plan Right Construction an order of
preference of 9 potential arbitrators out
of a total of 18 ttl.

RECORD AT 146: American Arbitration Assn.

NOTICE OF APPOINTMENT-To:

Willard E. Nielson-1480 8th Ave. Sacramento,
CA 95818: "You have been selected as
arbitrator in the above case, please sign
below and return. "It is most important
that the parties have complete confidence
in the arbitrator's impartiality. Therefore
please disclose any past or present relat-
ionship with the parties or their counsel,
direct, or indirect, whether financial,
professional, social or other kind. Any
doubt should be resolved in favor of dis-
closure. If you are aware of such relat-

(App. 21)

ionship, please describe it on the back of this form. The A.A.A. will call it to the attention of the parties counsel".

SIGNED 9-30-82

ADMISSIONS

RECORD AT 151: (2) "The responses of declarant herein to the points and arguments presented by petitioner in his "MOTION TO VACATE AND BRIEF" (brief) follow, as near as possible, the same order as presented in petitioners brief"

RECORD AT 152: (3) "The American Arbitration Assn. rules attached to ...Kile's brief.. are not those in effect.. (LINE 6):"By Kile's Own admission"... the rules attached were not effective. The rules governing ..were the earlier rules.."

(4) "The Court's attention is directed to Pacific's "RESPONSE OF PACIFIC BELL TO PETITION FOR CLARIFICATION OF ARBITRATION AWARD AND NOTICE OF INTENT TO VACATE.. INCORPORATES SUCH...THE FACTS

(App. 22)

stated in such Response are ..personal knowledge of declarant..declarant is competent to testify to the truth...(SEE RECORD AT 75-78)

RECORD AT 153 (6) "The relationship between the arbitrator and members of this declarants law firm were addressed in Pacific's "RESPONSE" beginning at P3,L22-26 as well as..declarants letter to the A.A.A. dated Nov 20,1985 attached hereto and incorporated ..as exhibit B, which letter was written in response to Kile's initial bias allegations to the A.A.A."

(7) "The location of the arbitration proceedings at declarant's law offices..was also treated in the exhibit "B" letter under Item no. 4, as well as in Pacific's Response on page 4 L14-27".

(8) "The contents of Pacific's exhibit "B" letter ..personal knowledge of this declarant...competent to testify to the truth..."

RECORD AT 155 (11) : "Kile, in this instance



(App. 23)

, AND IN OTHER ALLEGATIONS MADE IN SUPPORT OF HIS BIAS THEORY, has in declarant's opinion, a very selective recall of the facts."

(12) "A copy of the biographical sketch of the arbitrator.. was submitted to both parties.."

RECORD AT 156-(15) "Kile has ~~not~~ been prejudiced in this matter."

RECORD AT 157 : "I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct."

SIGNED
HENRY E. RODEGERDTS

"EXHIBIT B LETTER"

November 20, 1985

American Arbitration Assn.

445 Bush Street

Sanfrancisco, CA 94108....."Treating the points made by Mr. Kile in the order presented in his letter of November 15, 1985, Pacific Telephone responds as follows":

(App. 24)

"1.The undersigned suggests the reference here is to Mr. George Bayse, a partner in this law firm, and a fellow Rotarian with Mr. Neilsen, the arbitrator. The second day of the arbitration..during his lunch break, the arbitrator attended the rotary meeting...he mentioned knowing George Bayse. (SEE RECORD AT 77 #1.) This law firm is composed of more than 40 attorneys...I would anticipate the arbitrator knows other members of this firm."

"2."Pacific has no knowledge of the arbitrator ever having worked for it... Mr. Nielson was associated with Lawrence Construction... it is true.. Mr. Nielson had business dealings with employees of Pacific Telephone."

"4.The location of the place of arbitration or the ownership of the bldg. is hardly germane on the issue of bias."

"6.The alledged lack of experience of the arbitrator in all phases of the Const. business suggested by Mr. Kile is not shared

(App. 25)

by Pacific Telephone."

(note :the foregoing are AT RECORD 169,170)

RECORD AT 171;also EXHIBIT B LETTER: "Mr.

Kile's remedy, now that the hearing has been concluded should he not approve the ultimate award because of alledged misconduct on the part of the arbitrator, is to petition the Superior Court to vacate the award pursuant to California Code of Civil procedure sect. 1286.2"

RECORD AT 172: biographical sketch of the arbitrator ... "NOM. Charles A. Cooper"

RECORD AT 75: RESPONSE OF PACIFIC BELL....

[see record at 152 (4)] .. "this controversy has already caused too much grief to petitioner and too much expense to Pacific.."

RECORD AT 76: "In this war there were some initial salvos fired on the jurisdictional issue.." "big monolithic Pacific and its battery of attorneys"." "The circuitous route this case has taken to a final arbitration award certainly provides ample evidence that there is more than a scant-

(App. 26)

illa of truth to the belief held in the legal community that arbitration is neither swift nor economical."

RECORD AT 77: "Although petitioner has not actually advised the court of the grounds ..,they have been made abundantly clear in previous voluminous correspondence to Pacific and The A.A.A."

"1. On the second day of the arbitration hearing, the arbitrator .. mentioned he knew or had spoken to one of the partners in this law firm who was a fellow Rotarian."

"2.The arbitrator..was associated with Lawrence Construction Company and by reason of such had business dealings with employees of what was then the Pacific Telephone and Telegraph Company."

"3.The arbitration hearing was conducted at our offices in a building managed by Downtown Plaza Properties..... Mr. Nielsen was President of Downtown Plaza Properties.."

(App. 27)

RECORD AT 118: PROOF OF SERVICE TO
MOTION TO VACATE AND BRIEF:"I certify
said document is true".

RECORD AT 211: PROOF OF SERVICE TO
AGGRIEVED RESPONSE TO DECLARATION AND
OPPOSITION OF PT&T:"I Certify said document
is true".

NOTE JUDICIAL NOTICE OF dictionary/
thesaurus of "CERTIFY"